

Message Text

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MANILA FOR USDEL; CINCPAC FOR POLAD

E.O. 11652:GDS

TAGS:MARR, RP

SUBJECT:PHILIPPINE BASE NEGOTIATIONS: CRIMINAL JURISDICTION

REF: MANILA 9478 (USDEL 063)

1. WE HAVE APPROVED YOUR BASIC TEXT ON CRIMINAL JURISDICTION
WITH CERTAIN CHANGES. FOLLOWING IS THE APPROVED TEXT FOR
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REVISED PARA 1 THROUGH 5.C. OF ARTICLE XIV: QUOTE:

ARTICLE XIV
CRIMINAL JURISDICTION

1. IN ACCORDANCE WITH THE PROVISIONS OF THIS ARTICLE:

A. THE AUTHORITIES OF THE PHILIPPINES HAVE JURISDICTION OVER MEMBERS OF THE US FORCES IN THE PHILIPPINES WITH RESPECT TO OFFENSES COMMITTED WITHIN THE PHILIPPINES AND PUNISHABLE BY THE LAW OF THE PHILIPPINES.

B. THE PHILIPPINES CONSENTS THAT THE MILITARY AUTHORITIES OF THE UNITED STATES MAY EXERCISE WITHIN THE TERRITORY OF THE PHILIPPINES SUCH CRIMINAL AND DISCIPLINARY JURISDICTION AS IS CONFERRED ON THEM BY THE LAW OF THE

UNITED STATES OVER MEMBERS OF THE UNITED STATES FORCES FOR OFFENSES PUNISHABLE UNDER THE LAW OF THE UNITED STATES.

2.A. THE PHILIPPINES HAS THE RIGHT TO EXERCISE EXCLUSIVE JURISDICTION OVER MEMBERS OF THE US FORCES WITH RESPECT TO OFFENSES, INCLUDING OFFENSES RELATING TO ITS SECURITY, PUNISHABLE BY THE LAW OF THE PHILIPPINES, BUT NOT BY THE LAW OF THE UNITED STATES.

B. THE UNITED STATES HAS THE RIGHT TO EXERCISE EXCLUSIVE JURISDICTION OVER MEMBERS OF THE UNITED STATES FORCES WITH RESPECT TO OFFENSES, INCLUDING OFFENSES RELATING TO ITS SECURITY, PUNISHABLE BY THE LAW OF THE UNITED STATES BUT NOT BY THE LAW OF THE PHILIPPINES.

C. FOR THE REASONS OF THIS PARAGRAPH AND OF PARAGRAPH 3 OF THIS ARTICLE, A SECURITY OFFENSE AGAINST A STATE SHALL INCLUDE:

(1) TREASON AGAINST THE STATE;

(2) SABOTAGE, ESPIONAGE OR VIOLATION OF ANY LAW RELATING TO OFFICIAL SECRETS OF THAT STATE, OR SECRETS RELATING TO THE NATIONAL DEFENSE OF THAT STATE.

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3. FOR THE SOLE PURPOSE OF DETERMINING WHETHER AN ALLEGED ACT OR OMISSION IS A PUNISHABLE OFFENSE UNDER THE LAW OF THE PHILIPPINES OR UNDER THE LAW OF THE UNITED STATES, OR BOTH, THE INTERPRETATION OF PHILIPPINE LAW BY THE PHILIPPINE AUTHORITIES SHALL BE ACCEPTED BY THE AUTHORITIES OF THE UNITED STATES, AND THE INTERPRETATION OF THE LAW OF THE UNITED STATES BY THE AUTHORITIES OF THE UNITED STATES

SHALL BE ACCEPTED BY THE PHILIPPINE AUTHORITIES. WHEN, BY APPLICATION OF THE FOREGOING PROVISIONS, IT IS DETERMINED THAT AN ALLEGED ACT OR OMISSION WOULD BE A PUNISHABLE OFFENSE UNDER BOTH THE LAW OF THE PHILIPPINES AND THE LAW OF THE UNITED STATES, THEREBY GIVING RISE TO CURRENT RIGHTS TO EXERCISE JURISDICTION, THE FOLLOWING RULES SHALL APPLY:

A. THE PHILIPPINES HAS THE PRIMARY RIGHT TO EXERCISE JURISDICTION OVER MEMBERS OF THE US FORCES FOR ALL OFFENSES EXCEPT THOSE REFERRED TO IN PARAGRAPH 3B OF THIS ARTICLE.

B. THE UNITED STATES HAS THE PRIMARY RIGHT TO EXERCISE JURISDICTION OVER MEMBERS OF THE US FORCES FOR THE FOLLOWING OFFENSES:

(1) OFFENSES SOLELY AGAINST THE PROPERTY OR SECURITY OF THE UNITED STATES, OR OFFENSES SOLELY AGAINST THE PERSON OR PROPERTY OF A MEMBER OF THE UNITED STATES FORCES, A MEMBER OF THE CIVILIAN COMPONENT OR A DEPENDENT;

(2) OFFENSES ARISING OUT OF AN ACT OR OMISSION DONE IN THE PERFORMANCE OF OFFICIAL DUTY.

C. FOR PURPOSES OF PARAGRAPH 3B(1) OF THIS ARTICLE, THE PHRASE "OFFENSES SOLELY AGAINST THE PERSON OR PROPERTY OF A MEMBER OF THE UNITED STATES FORCES, A MEMBER OF THE CIVILIAN COMPONENT OR A DEPENDENT" SHALL INCLUDE ALL OFFENSES IN WHICH THE ALLEGED PERPETRATOR IS A MEMBER OF THE UNITED STATES FORCES AND THE ALLEGED VICTIM IS A MEMBER OF THE UNITED STATES FORCES, A MEMBER OF THE CIVILIAN COMPONENT OR A DEPENDENT. UNQUOTE.

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FYI: WITH RESPECT TO YOUR PROPOSED PARA 3 D WE WOULD PREFER NOT TO HAVE A DEFINITION OF OFFICIAL DUTY. OUR EXPERIENCE WITH 1965 DEFINITION HAS SHOWN THAT A DEFINITION IS UNHELPFUL AND ONLY LEADS TO HAGGLING. MOREOVER, WE HAVE AS YET BEEN UNABLE TO DEVISE FORMULATION WHICH ADEQUATELY PROTECTS OUR POSITION, PARTICULARLY REGARDING PERFORMANCE OF DISCRETIONARY FUNCTIONS. END FYI.

4. RESUME TEXT QUOTE:

4. WHENEVER THE UNITED STATES ASSERTS THAT ANY CHARGES FILED WITH A FISCAL'S OFFICE AGAINST A MEMBER OF THE UNITED STATES FORCES FALL WITHIN THE PROVISIONS OF PARAGRAPH 3B(2) OF THIS ARTICLE, AND THE FISCAL DOES NOT QUESTION THIS ASSERTION, THE UNITED STATES WILL BE FREE TO EXERCISE JURISDICTION IN THE CASE.

5. THE FOLLOWING PROCEDURES WILL BE APPLIED BY THE AUTHORITIES OF THE PHILIPPINES AND THE UNITED STATES WHENEVER THE UNITED STATES ASSERTS THAT ANY CHARGES FILED WITH A FISCAL'S OFFICE AGAINST A MEMBER OF THE US FORCES FALL WITHIN THE PROVISIONS OF PARA 3B(2) OF THIS ARTICLE AND THE FISCAL QUESTIONS THIS ASSERTION.

A. THE FISCAL CONCERNED MAY REVIEW THE FACTS UPON WHICH THE ALLEGATION IS BASED AND DETERMINE WHETHER THE ALLEGATION STATES AN OFFENSE AGAINST PHILIPPINE LAW. HIS CONCLUSION WILL BE COMMUNICATED TO THE APPROPRIATE US STAFF JUDGE ADVOCATE WITHIN 15 DAYS OF THE FILING OF THE CHARGES.

B. THE US AUTHORITIES MAY REVIEW THE FACTS UPON WHICH THE ALLEGATION IS BASED AND DETERMINE WHETHER THE ALLEGATION STATES AN OFFENSE AGAINST US LAW. THE CONCLUSION WILL BE COMMUNICATED TO THE FISCAL CONCERNED WITHIN 15 DAYS OF THE FILING OF CHARGES.

C. IF IT IS DETERMINED THAT THE ALLEGATION STATES AN OFFENSE AGAINST THE LAW OF ONLY ONE STATE, THE AUTHORITIES OF THAT STATE MAY PROCEED TO EXERCISE JURISDICTION. IF IT IS DETERMINED THAT THE ALLEGATION DOES NOT STATE AN OFFENSE AGAINST THE LAW OF EITHER STATE, ANY CHARGES

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THAT MAY BE PENDING WILL BE DISMISSED. IF IT IS DETERMINED THAT THE ALLEGATION STATES AN OFFENSE AGAINST THE LAW OF BOTH STATES, THE US STAFF JUDGE ADVOCATE WILL SO INFORM THE US FACILITIES COMMANDER AND WILL PROVIDE HIM WITH A WRITTEN OPINION ON THE QUESTION OF THE APPLICABILITY OF PARA 3B(2). IN CASES WHERE THE US FACILITIES COMMANDER DETERMINES THAT PARA 3B(2) APPLIES, HE WILL SO NOTIFY THE PHILIPPINE BASE COMMANDER IN WRITING WITH A COPY TO THE FISCAL. IN THE ABSENCE OF A REPLY FROM THE PHILIPPINES BASE COMMANDER WITHIN TEN DAYS OF SUCH NOTIFICATION, OR IN THE EVENT THAT THE PHILIPPINE BASE COMMANDER EXPRESSES HIS CONCURRENCE WITH THE DETERMINATION OF THE US FACILITIES COMMANDER, THE US WILL BE FREE TO EXERCISE JURISDICTION. IF THE PHILIPPINE BASE COMMANDER INFORMS THE US FACILITIES COMMANDER OF HIS NONCONCURRENCE WITHIN TEN DAYS OF SUCH NOTIFICATION, THE PHILIPPINE BASE COMMANDER AND THE US FACILITIES COMMANDER, WITH THE ADVICE OF THE FISCAL AND THE US STAFF JUDGE ADVOCATE, RESPECTIVELY, WILL SEEK TO REACH AGREEMENT. IF AGREEMENT IS NOT REACHED WITHIN 15 DAYS OF THE INITIAL NOTIFICATION FROM THE US FACILITIES COMMANDER, THE QUESTION OF THE APPLICABILITY OF PARA 3B(2) WILL BE REFERRED BY THE

PHILIPPINE BASE COMMANDER AND THE US FACILITIES COMMANDER JOINTLY TO THE CRIMINAL JURISDICTION IMPLEMENTATION COMMITTEE. UNQUOTE.

2. BALANCE OF REDRAFT SET FORTH REFTEL BEGINNING WITH PARA 4 D IS APPROVED, EXCEPT FOR PARA 14 WHICH WILL BE SUBJECT REFTEL. PARA 4 D WILL NOW BE 5 D AND THE FOLLOWING PARAS RENUMBERED.

3. INTRODUCTION OF PHIL BASE COMMANDER INTO CRIMINAL JURISDICTION PROCEDURES AS RECOMMENDED BY US DELEGATION HAS BEEN APPROVED WITH SOME RELUCTANCE. WE ARE PARTICULARLY CONCERNED OVER THE EFFECT SUCH A PROVISION IN THE AGREEMENT MIGHT HAVE ON THE CONSISTENT US POSITION

THAT CRIMINAL JURISDICTION PROVISIONS OF OUR VARIOUS SOFAS CONTEMPLATE ONLY EXERCISE OF JURISDICTION BY LOCAL CIVIL AUTHORITIES AND NOT HOST MILITARY AUTHORITIES. ALTHOUGH INVOLVEMENT OF THE PHIL BASE COMMANDER IN THE CONFIDENTIAL

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OFFICIAL DUTY DETERMINATION PROCESS DOES NOT CONSTITUTE EXERCISE OF JURISDICTION BY PHIL MILITARY AUTHORITIES OVER US PERSONNEL, IT COULD ENCOURAGE PHIL MILITARY INTEREST AND FURTHER INVOLVEMENT IN CRIMINAL JURISDICTION MATTERS WHICH COULD COMPLICATE OUR EFFORTS TO AVOID THE EXERCISE OF PHIL MILITARY JURISDICTION OVER U.S. FORCES PERSONNEL IN ANY CASES THAT MIGHT ARISE.

4. WE ARE ALSO CONCERNED OVER THE APPARENT INTENTION OF THE GOP, AS REITERATED IN THE RECENT MARTIAL LAW DECREE, TO SUBJECT U.S. FORCES PERSONNEL TO THE JURISDICTION OF PHIL MILITARY COURTS FOR CERTAIN OFFENSES, SUCH AS SUBVERSION. WE INVITE EMBASSY RECOMMENDATIONS ON HOW WE SHOULD GO ABOUT MAKING IT CLEAR TO MARCOS THAT THE UNITED STATES WILL NOT PERMIT THE EXERCISE OF JURISDICTION BY A PHIL MILITARY COURT OVER U.S. FORCES PERSONNEL UNDER ANY CIRCUMSTANCES. IN LIGHT OF EXPLICIT WORDING OF DECREE, WE DO NOT FEEL WE CAN REMAIN SILENT ON ISSUE IN THE HOPE PROBLEM NEVER ARISES.

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